

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

National Right to Life Political Action Committee
and Carol Tobias, in her official capacity as treasurer

2009 AUG -6 A 11: 24

MUR 6133

**RESPONSE TO GENERAL COUNSEL'S BRIEF
AND REQUEST FOR HEARING**

In their January 24, 2009, submission¹ to the commissioners and the general counsel's office ("OGC")

Respondents National Right to Life Political Action Committee and Carol Tobias, in her official capacity as treasurer (together referred to as NRL PAC), moved the Federal Election Commission ("FEC") to dismiss this matter with admonishment.

In filing 24 hour reports, *see* 11 C.F.R. § 104.4(c), (f) (2003), 104.5(g)(2) (2003), and 48 hour reports, *see id.* §§ 104.4(b)(2), 104.5(g)(1), for independent expenditures, NRL PAC – not having consulted counsel – misunderstood the law and filed the reports not within 24 or 48 hours of doing the communications but within 24 or 48 hours of spending the money for the communications. This turned out fortunately when NRL PAC paid for their advertisements before they were publicly distributed (e.g., radio ads for which stations required advance payment), but not when they were paid for afterwards (e.g., GOTV calls or printed mail for which the cost was unknown prior to billing by the vendor a month or so after dissemination). In short, Mrs. Tobias's able predecessor,² who was treasurer at the time (hereinafter "the Treasurer"), made one mistake. However, she repeated the same mistake several times.³

¹Exh. 1 (hereinafter RESP. OF JAN. 24, 2009).

²The OGC insists on naming the current treasurer in this MUR, even though another treasurer was serving during the 2004 election cycle.

³RESP. OF JAN. 24, 2009, at 3-4. In this matter, NRL PAC paid several vendors only after receiving invoices a month or so after dissemination of the communication, because until it

As previously noted, this mistake was understandable, since neither (1) the reporting form,⁴ (2) the reporting-form instructions,⁵ (3) the FEC campaign guide that was out of date at the time,⁶ (4) *The Record*,⁷ (5) FEC regulations,⁸ nor (6) the Federal Election Campaign Act, 2 U.S.C. § 431 *et seq.* ("FECA"),⁹ are clear. In fact, they are downright confusing, especially to the laity. Those engaging in political speech should not have to consult professionals¹⁰ just to engage in speech that is at the core of what the First Amendment protects.¹¹ Nevertheless, NRL PAC did not do what the law required, so they moved the FEC to dismiss this matter with admonishment.¹²

received the invoice, it didn't know what the cost was. Many independent expenditures were billed on the same invoice, thus, the Treasurer wrote several checks for the 130 independent expenditures reported late. Reports were filed after each payment. Thus, the Treasurer made the same mistake only a few times, not 130 times as suggested by the General Counsel's Brief.

⁴*Id.* at 5-8.

⁵*Id.*

⁶*Id.* at 8-11.

⁷*Id.* at 11-14.

⁸*Id.* at 14-16.

⁹*Id.* at 16-17.

¹⁰*See id.* at 17.

¹¹*See FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, ___, 127 S.Ct. 2652, 2665 (2007); *McConnell v. FEC*, 540 U.S. 93, 217 (2003) (quoting *Buckley v. Valeo*, 424 U.S. 1, 48 (1976)); *FEC v. Colorado Republican Fed. Campaign Comm.*, 518 U.S. 604, 616 (1996) ("*Colorado Republican I*") (citing *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989)); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346-47 (1995); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 657 (1990) (quoting *Buckley*, 424 U.S. at 39); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 251 (1986) ("*MCFL*") (quoting *Buckley*, 424 U.S. at 39); *FEC v. National Conservative PAC*, 470 U.S. 480, 493 (1985) ("*NCPAC*") (quoting *Buckley*, 424 U.S. at 14); *Buckley*, 424 U.S. at 44-45.

¹²RESP. OF JAN. 24, 2009, at 18.

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Recently, the FEC announced that it closed the file in a similar matter *without* admonishing the respondent.¹⁸ Three commissioners said the respondent had made “a single error, and not the artificially high percentage brandished about by OGC and our colleagues.”¹⁹ What happened in that matter is what happened here: “In reality, there was at worst a single mistake – but the committee made the same alleged ‘mistake’ [many] times”²⁰ “Rather than find [respondents] guilty of one mistake, [FEC staff] essentially dinged [them] for each error”²¹ And while the respondents eventually prevailed, the cost of victory was high.²² Even though at the end of the day there were no civil liabilities or criminal penalties, being cleared provides little comfort to those whom government has wronged through a process that becomes the punishment. *See, e.g., WRTL II*, 127 S.Ct. at

¹⁸*See In re Sekhon for Congress, Matter Under Review 5957, Certification* (Oct. 23, 2008), available at <http://eqs.sdrdc.com/eqsdocs/28044220539.pdf> (all Internet sites visited July 30, 2009).

¹⁹*Id.*, Statement of Reasons of Three Commissioners at 16 (June 24, 2009), available at <http://eqs.sdrdc.com/eqsdocs/29044243981.pdf>.

²⁰*Id.*

²¹*Our Pettifogging FEC*, WALL STREET JOURNAL (July 11, 2009), available at <http://online.wsj.com/article/SB124726320712825213.html#mod=djemEditorialPage>

²²*See id.*

2666 n.5. "The right of free speech can be trampled or chilled even if convictions are never obtained" and civil liabilities are never imposed. *FEC v. Hall-Tyner Election Campaign Comm.*, 678 F.2d 416, 422 n.15 (2d Cir. 1982), *cert. denied*, 459 U.S. 1145 (1983).

Nevertheless, OGC, in what may be the role of a prosecutor seeking a conviction,²³ disagrees with NRL PAC's previous submission regarding this matter. So OGC summarizes its view of the facts²⁴ and begins its analysis by saying the law is "quite clear."²⁵ To support this, OGC gives a two-page summary.²⁶ However, someone from the laity who reads this summary would still not understand that the date of an "expenditure" is sometimes the date a communication is disseminated, and sometimes the date of payment, whichever occurs first.²⁷ Instead of plainly saying this, OGC says:

- Reports are due based on when "the independent expenditure is publicly distributed or otherwise disseminated."²⁸ To the lay reader, this means that reports are due after payment because "expenditure" means "payment."
- The FEC must receive reports "after the expenditure is made."²⁹ Again, to the lay reader, this means that reports are due after payment.
- Certain reports were due after "expenditures aggregated \$10,000 or more."³⁰

²³See COMMENTS OF THE JAMES MADISON CTR. FOR FREE SPEECH ON FEC NOTICE 2008-13 at 2, 6, 9, 10, 14, 16, 17 (Dec. 19, 2008), *available at* <http://www.fec.gov/law/policy/enforcement/2009/comments/comm18.pdf>.

²⁴See GEN. COUNSEL'S BR. ("OGC BR.") at 1-2 (July 20, 2009),

²⁵*Id.* at 3.

²⁶See *id.* at 3-4.

²⁷See *id.*

²⁸*Id.* at 3.

²⁹*Id.*

³⁰*Id.*

Again, we have the same confusion.

Only after implying three times that an “expenditure” is a payment does OGC intimate that an expenditure may be the dissemination of a communication, but even then, OGC does not say so directly.³¹ And then OGC reverts to the old confusion by saying a report is due after “the independent expenditure is publicly distributed or disseminated.”³² But it is not the “expenditure” that is disseminated, it is the communication.

One might think that when NRL PAC asserts that the FEC has not explained the law clearly, that the FEC would rebut this charge by explaining the law clearly. However, the explanation in the OGC’s brief is not much better than the sources that confused the Treasurer in the first place.

Campaign-finance professionals – such as OGC staff members, commissioners, and commissioners’ staffs – understand that, here, the date of the “expenditure” is the date of the dissemination of the communication, not the date of payment. So do lawyers who work in this field. But many in the laity may not understand this, and the FEC forms, instructions, law, and explanations that NRL PAC cited in their January 24, 2009, submission do not make this clear.

But even if the OGC brief had made this clear, the real point is that nowhere did the FEC provide³³ concise, correct, easy-to-understand information to the Treasurer *when she needed it*.

OGC’s protest that *The Record* was clear³⁴ does not address, much less refute, NRL PAC’s explanation that it was not.

³¹*See id.*

³²*Id.* at 4.

³³Or to use what appears to be OGC’s favorite phrase in its brief, the FEC “failed” to provide this information. *See id.* at 1 (“failing”), 2 (“failed” twice, and “failing”), 3 (“failed”), 7 (“failed”).

³⁴*Id.* at 4.

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OGC's assertion that the Treasurer's attendance at an FEC seminar in 2003³⁵ makes the Treasurer's mistake inexcusable fails to show that the seminar leaders used any clearer language in their seminar. Moreover, the consequences of OGC's argument are noteworthy. OGC in effect announces that it may use attendance at FEC seminars *against respondents* in enforcement actions, because attendance renders violators inexcusable for their violations. Unless the commissioners reject this argument, lawyers will quickly consider advising their clients *never, ever* to attend FEC seminars.

OGC then parses the word "laity"³⁶ and cites an unidentified commenter in a 2002 explanation and justification.³⁷ While OGC goes on to discuss the importance of the treasurer's role in political committees,³⁸ that does not address, much less refute, NRL PAC's argument in its January submission. Nor does OGC otherwise address NRL PAC's detailed argument and citation to authorities.

Since the FEC has not effectively refuted NRL PAC arguments, as stated in their January submission, this matter should be dismissed. Or the FEC could just close the file as it did in *Sekhon*. "Enough is enough." *WRTL II*, 127 S.Ct. at 2672.

REQUEST FOR HEARING

Respondents NRL PAC and the Treasurer request a probable cause hearing before the Commission pursuant to Notice 2007-21, Rules and Regulations, 72 Fed. Reg. 64919 (Nov. 19, 2007).

A hearing is being requested because (1) the form, instructions, campaign guide, The Record, regulations, and FECA remain unclear as to what date triggers the due date for filing 24 and 48 hour reports; (2) sometimes a single mistake in interpretation by a treasurer results in multiple violations; and (3) multiple

³⁵*Id.*

³⁶*See id.* at 4, 6.

³⁷*Id.* at 5.

³⁸*Id.* at 6-7.

violations may result in a disproportionately high civil penalty for an organization that is attempting good faith compliance (i.e., large penalties should be reserved for willful violations).

The issues that NRL PAC will address at the hearing are: (1) whether the form, instructions, campaign, regulations, and/or FECA provide a clear explanation of what events trigger the due date for filing 24 and 48 hour reports; (2) whether a single mistake in interpretation by a treasurer should be considered as one violation, or multiple violations, for each expenditure based on that mistaken interpretation; (3) whether good faith compliance should be taken into consideration by the OGC when a reasonable explanation exists for late filing of a report, as opposed to negligent failure to file at all; (4) whether attendance at an FEC seminar should be the basis for finding a violation to be inexcusable, especially when the violation involves the first election cycle in which a new regulation is in effect; and (5) whether the current treasurer is the proper party to an enforcement action for alleged violations during an election cycle when there was a different treasurer.

8-5-09

Date

By a Bostrom

James Bopp, Jr.

Barry A. Bostrom

James Bopp, Jr.
Barry A. Bostrom
Bopp, Coleson & Bostrom
1 South Sixth Street
Terre Haute, IN 47807-3510
812-232-2434
812-235-3685 (fax)
bbostrom@bopplaw.com

Counsel for Respondents